

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ERIC SENG,)
) No. 07-1694-HU
Plaintiff,)
)
v.)
) FINDINGS AND
FEDEX FREIGHT WEST, INC.,) RECOMMENDATION
a California corporation,)
)
Defendant.)
_____)

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HUBEL, Magistrate Judge:

This is an action by Eric Senga against his employer, FedEx Freight West (FedEx) for a single claim of retaliation in violation of Or. Rev. Stat. § 659A.030 and 42 U.S.C. § 2000e-3(a). Senga seeks damages and equitable relief, including compensatory damages,

1 back pay, and front pay. Senga alleges that after he complained to
2 FedEx about race discrimination, it retaliated against him by
3 denying him promotions for which he was qualified, and by taking
4 other actions. FedEx moves for partial summary judgment on some of
5 the allegations and claims. Senga has conceded two: his claim that
6 he should have been awarded a position as the Service Center
7 Manager (SCM) of the Sacramento facility, and his claim that he
8 should have been awarded a position as a Special Projects Manager.
9 The remaining claims and allegations against which FedEx moves are:
10 1) the allegation that Senga's email was placed under surveillance
11 by FedEx; 2) Senga's allegation that he was counseled for sleeping
12 in a regional meeting, when in fact he was not sleeping; 3) the
13 claim that Senga should have been promoted to a position as the SCM
14 of the Portland facility; and 4) Senga's claim for front pay.

15 **Factual Background**

16 FedEx operates service centers of varying sizes which function
17 as transportation hubs where inbound freight is sorted, reloaded,
18 and sent on for further transport and delivery. Management
19 positions in service centers include the SCM, Assistant SCM (for
20 service centers of a certain size or volume), Operations Managers,
21 and other management and supervisory positions reporting to
22 Operations Managers. A normal promotional path is from Operations
23 Manager to Assistant SCM in a large facility, or Operations Manager
24 to SCM in a smaller facility, but this is not a rigid policy.

25 Eric Senga is of African descent. He is an Operations Manager
26 at the Portland facility. Operations Manager is the most senior
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1 position Senga has held with FedEx, and he continues in that
2 position.

3 In late 2005, Senga learned that a position as Assistant SCM
4 at the Phoenix service center was available. Although Senga had
5 previously said he was not interested in moving to Phoenix, he
6 applied and was interviewed for the position. Scott DePoto, another
7 Portland Operations Manager who also applied for the position, was
8 hired. Senga admits that he was not better qualified than DePoto,
9 but he believed he and DePoto were equivalent in their
10 qualifications. Upon learning that DePoto had been selected, Senga
11 sent an email dated December 16, 2005, to the Phoenix SCM, Brad
12 Housner, and an HR manager, complaining of race discrimination.
13 Barran Declaration, Exhibit A (Senga dep.), Exhibit 4 (email).
14 Senga's email describes the "whole job application process" as
15 "despicable," claims he was subjected to a "mock interview" and
16 made a fool of, and states that "none of you are to be trusted
17 especially since you all thought the black man was too stupid to
18 figure this out. In this case Sambo was a lot smarter then [sic] he
19 was given credit for." Id. The email concluded,

20 I deserved much better and you should have been man
21 enough to tell me when this was a foregone conclusion. I
22 would not have treated an animal the way you people
23 treated me, but I guess I am just the black man who is
supposed to go sit in the corner and not say anything.
Dead wrong. I wish you a good life. No need to respond.

24 Id.

25 Before December 16, 2005, Senga had never made a complaint of
26 race discrimination, although he expressed displeasure over the
27 filling of positions in Las Vegas and Seattle. Senga had a

1 conversation with Daren van Wagenen, who was at that time Managing
2 Director for the North Region of FedEx, to express his displeasure
3 about FedEx's having chosen Mike Arvai to be SCM in Seattle, but
4 did not mention race.

5 Senga's personal belief is that DePoto asked van Wagenen to
6 step in and make sure DePoto was given the Phoenix position. When
7 van Wagenen was asked by the Phoenix decisionmakers who he thought
8 was the better candidate, as between Senga and DePoto, van Wagenen
9 responded that he did not think they could go wrong with either
10 candidate, though DePoto might be a better team builder. Senga
11 believes this statement by van Wagenen was in retaliation for
12 challenging the hiring of Arvai as SCM in Seattle.

13 In August 2006, van Wagenen observed Senga at an annual
14 regional conference in what appeared to him to be a posture of
15 sleeping, and asked Senga's manager to speak to him about it. The
16 manager did so, and Senga denied that he had been asleep. Senga was
17 not disciplined by his manager. At oral argument, Senga conceded
18 that being counseled for sleeping was not an adverse employment
19 action that could support a claim of retaliation.

20 In November 2006, Mike Harris was hired to be the Portland
21 SCM, a position Senga had also applied for. Harris had worked as an
22 Operations Manager and also had five years of experience as
23 Assistant SCM in Fontana, California. Senga acknowledges that he
24 has no experience as an Assistant SCM, but believes he had
25 equivalent qualifications because he had filled in for the SCM at
26 the Portland facility on occasion. Senga concedes that he is not

1 better qualified than Harris.

2 Senga alleges that FedEx also retaliated against him by
3 blocking his receipt of emails from his wife and another individual
4 that contained the words, "EEOC," "BOLI," and "discrimination."
5 During oral argument, the court held that it would recommend
6 granting partial summary judgment on the claim that FedEx engaged
7 in retaliation by blocking Senga's email messages, because the
8 record before the court contained no evidence from which a
9 reasonable juror could find that FedEx was responsible for Senga's
10 not receiving certain emails. The recommendation does not preclude
11 Senga from introducing additional evidence about this or other
12 issues at trial. The trial judge can address that issue at the
13 pretrial conference.

14 Standards

15 A party is entitled to summary judgment if the "pleadings,
16 depositions, answers to interrogatories, and admissions on file,
17 together with affidavits, if any, show there is no genuine issue as
18 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is
19 not proper if material factual issues exist for trial. Warren v.
20 City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A genuine
21 dispute arises "if the evidence is such that a reasonable jury
22 could return a verdict for the nonmoving party." State of
23 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). Where
24 the record taken as a whole could not lead a rational trier of fact
25 to find for the non-moving party, there is no genuine issue for
26 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.

1 574, 587 (1986).

2 On a motion for summary judgment, the court must view the
3 evidence in the light most favorable to the non-movant and must
4 draw all reasonable inferences in the non-movant's favor. Clicks
5 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9th Cir.
6 2001). The court may not make credibility determinations or weigh
7 the evidence. Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55
8 (1990). "Credibility determinations, the weighing of the evidence,
9 and the drawing of legitimate inferences from the facts are jury
10 functions, not those of a judge." Reeves v. Sanderson Plumbing
11 Products, Inc., 530 U.S. 133, 150 (2000). Where different ultimate
12 inferences may be drawn, summary judgment is inappropriate.
13 Sankovich v. Ins. Co. of N. Am., 638 F.2d 136, 140 (9th Cir. 1981).

14 Discussion

15 I. Motion for Partial Summary Judgment

16 A. Prima facie case

17 To establish a prima facie retaliation claim, a plaintiff is
18 required to show (1) involvement in a protected activity; (2) an
19 adverse employment action taken against the plaintiff; and (3) a
20 causal link between the two. See, e.g., Little v. Windermere
21 Relocation, Inc., 265 F.3d 903, 913 (9th Cir. 2001).

22 1) Protected activity

23 For purposes of this motion, FedEx does not challenge this
24 element of Senga's prima facie case, and treats the December 2005
25 email to the Phoenix SCM as protected activity.

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1 2) Adverse employment action

2 In the context of a retaliation claim, an "adverse employment
3 action" is an action that a reasonable employee would have found
4 materially adverse, meaning action that "might have dissuaded a
5 reasonable worker from making or supporting a charge of
6 discrimination." Burlington N. & Santa Fe Rwy. Co. v. White, 126
7 S.Ct. 2405, 2411 (2006); see also Ray, 217 F.3d at 1243 (employment
8 action is adverse in retaliation claim if it is "reasonably likely
9 to deter employees from engaging in protected activity.") Only
10 "non-trivial employment actions that would deter reasonable
11 employees from complaining about Title VII violations will
12 constitute actionable retaliation." Brooks v. City of San Mateo,
13 229 F.3d 917, 928 (9th Cir. 2000).

14 3) Causal link

15 To establish causation, the employee must show "by a
16 preponderance of the evidence that engaging in the protected
17 activity was one of the reasons for" the adverse employment action,
18 and that, but for such protected activity, the employee would not
19 have suffered the adverse employment action. See Villiarimo v.
20 Aloha Island Air, Inc., 281 F.3d 1054, 1064-65 (9th Cir. 2002).

21 FedEx asserts that Senga's claim that he was retaliated
22 against when he was not promoted to Portland SCM must fail because
23 he has not demonstrated a causal link between this action and his
24 complaint of discrimination. FedEx argues that Mike Harris, the
25 successful candidate, had relevant management experience as an
26 Assistant SCM that Senga lacked. Harris had held the position of

1 Assistant SCM for five years, while Senga's management experience
2 had never gone beyond the Operations Manager level, except for
3 occasional "fill-ins."

4 FedEx contends that Senga has acknowledged that he has no
5 factual information to support his claim that Harris's promotion to
6 the position he applied for was retaliatory, citing Senga's
7 deposition testimony:

8 Q: Can you tell me any facts that you have, any
9 information that you have, that there was some
reason to select Mike Harris for the Portland
position, other than his experience level?

10 A: Are you asking, other than my belief?

11 Q: Yes.

A: I have no other reasons than my belief.

12 Senga dep. 204:6-12. Senga also acknowledged that Harris "has the
13 qualification of having been an assistant SCM, which I do not
14 have." Id. at 24:22-25.

15 FedEx argues that employers are not required by law to choose
16 a protected employee in a competition between equally qualified
17 candidates, citing Furnco Constr. Corp. v. Waters, 438 U.S. 567,
18 577-78 (1978) ("[T]he employer has discretion to choose among
19 equally qualified candidates, provided the decision is not based
20 upon unlawful criteria.")

21 Senga counters that the causal link can be inferred because
22 the "timing in this case is uncanny." Senga points out that he
23 filed a second charge with the EEOC on September 22, 2006, and then
24 amended the charge on November 3, 2006, Senga Declaration ¶¶ 94-96,
25 Exhibit OO, and that these events were in close proximity to the
26 November 10, 2006 interview for the Portland SCM position, and the
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1 December 16, 2006 appointment of Mike Harris to that position.
2 Senga asserts further that he has created a material issue of fact
3 on this element because there is "genuine issue of material fact as
4 to why Harris (an outsider to the Portland center) would have been
5 chosen over Plaintiff who had worked at the Center for six years
6 prior, and had covered in the absence of the SCM at the Portland
7 Center." Plaintiff's Brief, p. 14.

8 In reply, FedEx acknowledges that timing is sufficient to
9 raise an inference of retaliation at the prima facie stage, but
10 that it has rebutted that inference by articulating non-retaliatory
11 reasons for hiring Mike Harris.

12 4) Pretext

13 Once plaintiff makes such a prima facie showing, the burden
14 shifts to the defendant to articulate a legitimate
15 nondiscriminatory reason for its decision. Ray v. Henderson, 217
16 F.3d 1234, 1240 (9th Cir. 2000). If the defendant articulates such
17 a reason, the plaintiff bears the ultimate burden of demonstrating
18 that the reason was a pretext. Id. A plaintiff can establish
19 pretext in two ways: "(1) indirectly, by showing that the
20 employer's proffered explanation is 'unworthy of credence' because
21 it is internally inconsistent or otherwise not believable, or (2)
22 directly, by showing that unlawful discrimination more likely
23 motivated the employer." Chuang v. University of California Davis
24 Bd. of Trustees, 225 F.3d 1115, 1127 (9th Cir. 2000).
25 Circumstantial evidence must be "specific" and "substantial" to
26 create a genuine issue of material fact. Nilsson v. City of Mesa,

1 503 F.3d 947, 954 (9th Cir. 2007).

2 A plaintiff's belief that a defendant acted from an unlawful
3 motive, without evidence supporting that belief, is no more than
4 speculation or unfounded accusation about whether the defendant
5 really did act from an unlawful motive. Carmen v. San Francisco
6 Unified School Dist., 237 F.3d 1026, 10928 (9th Cir. 2001).

7 FedEx contends that Senga has not met his burden of showing
8 pretext. FedEx has submitted a second declaration from Daren van
9 Wagenen stating that throughout his tenure as Managing Director for
10 the Northern Region, all of his promotions were of "outside"
11 candidates, i.e., they resulted in an individual's being placed
12 into a position at a different service center. Second Declaration
13 of van Wagenen, ¶ 2. Van Wagenen then lists nine separate
14 promotions of outsiders. Id. at ¶¶ 3-11. According to van Wagenen,
15 such outside promotions are more advantageous because they allow
16 multiple location experience.

17 Van Wagenen acknowledges that occasionally, an operations
18 manager will fill in for a SCM where, as in Portland, the service
19 center does not have an assistant manager. Id. at ¶ 14. However,
20 according to van Wagenen, although such situations allow an
21 operations manager to "stretch himself or herself and gain valuable
22 skills," it is "not nearly as significant as the experience that is
23 gained from actually holding the position of ... assistant service
24 center manager... day in and day out," as Mike Harris did for five
25 years. Id. at ¶¶ 14, 15. FedEx cites Surrell v. California Water
26 Serv. Co., 518 F.3d 1097, 1107 (9th Cir. 2008) (successful

1 candidate's management experience distinguished her as most
2 qualified candidate for managerial position).

3 FedEx argues that Senga has nothing more than his own
4 subjective belief that he was as well qualified as Harris (he does
5 not claim to be better qualified), by virtue of having covered for
6 the SCM in Portland, and that this is not sufficient to enable him
7 to survive summary judgment. Bradley v. Harcourt, Brace & Co., 104
8 F.3d 267, 270 (9th Cir. 1996) (employee's subjective personal
9 judgment of competence alone does not raise genuine issue of
10 material fact); Blue v. Widnall, 152 F.3d 1149, 1152 (9th Cir.
11 1998) (the closer the qualifications of the candidates, the less
12 weight the court should give to perceived differences in
13 qualifications in deciding whether proffered explanation is
14 pretextual; subjective personal judgments of qualifications do not
15 raise genuine issues of material fact).

16 I conclude that the timing and a fairly consistent pattern of
17 employment decisions by van Wagenen with a negative impact on
18 Senga, including lowered ratings on performance reviews, the
19 suggested counseling for sleeping, and the failure to hire Senga
20 for the Portland position are sufficient to generate a question of
21 fact on whether FedEx's proffered reasons for not hiring Senga are
22 unworthy of belief. A jury could decide Senga came out on the
23 losing end of FedEx's choices, or that FedEx was building a record
24 against Senga, on the basis of a retaliatory motive. Because the
25 jury might agree or disagree with any decision the court might
26 make, the decision should be the factfinder's.

1 I recommend that the motion for partial summary judgment on
2 the failure to promote Senga to the Portland SCM position be
3 denied.

4 B. Front pay

5 FedEx moves against Senga's claim for front pay on the ground
6 that front pay is a remedy used as an alternative to reinstatement
7 or other injunctive relief, and that such a remedy is not
8 appropriate in this case because Senga is still employed in a
9 management position with FedEx, and because Senga denies any
10 interpersonal difficulties with FedEx personnel. See Senga dep.
11 51:10-54:16.

12 "An award of front pay is made in lieu of reinstatement when
13 the antagonism between employer and employee is so great that
14 reinstatement is not appropriate." Fadhl v. City and County of San
15 Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984), *overruled on other*
16 *grounds*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); see also
17 Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986).
18 FedEx argues that because Senga testified that there is no
19 antagonism here, front pay is not an appropriate remedy.

20 In response, Senga argues that his claim for front pay is
21 viable because he can recover "the difference between what he would
22 have received had he been promoted, and what he is making [now], as
23 such wage loss will continue into the future." Plaintiff's
24 Response, p. 14-15. Senga admits that "the issue of how to
25 characterize such damages is murky," but argues that "irrespective
26 of the label, the appropriate remedy under the "retroactive
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1 seniority doctrine," which allows the court in denial of merit
2 based raises to have the plaintiff "deemed promoted" with
3 retroactive seniority, is front pay. Senga cites Zipes v. Trans
4 World Airlines, Inc., 455 U.S. 385, 398-99 (1982) as legal
5 authority for this position.

6 I conclude that a ruling on front pay at this time would be
7 premature, and recommend that the motion for partial summary
8 judgment on Senga's entitlement to front pay be denied with leave
9 to renew the motion before the trial judge.

10 II. Request for Judicial Notice

11 Senga requests that the court take judicial notice of an
12 excerpt from the Rutter Group treatise, *Federal Employment*
13 *Litigation*, page 11-7, §§ 11:62-64, because the treatise cites the
14 Zipes case in a manner he feels is supportive of his argument that
15 Senga was entitled to a promotion, or "job skipping," (i.e.,
16 skipping over lines of progression within the work force) as a
17 remedy for past discrimination. Because this motion goes to the
18 issue of front pay, which is deferred for a ruling by the trial
19 court, I recommend that this motion be denied.

20 III. Motion to Strike

21 _____ FedEx moves to strike portions of the declarations submitted
22 by Eric and Victoria Senga.

23 Victoria Senga

24 The court has not relied on Victoria Senga's declaration for
25 any of its rulings herein. The motion is therefore denied as moot.

26 Eric Senga

1 FedEx moves to strike paragraph 59 of Eric Senga's
2 declaration. The court has not relied on this portion of the
3 declaration for any of its rulings herein. The motion is denied as
4 moot.

5 Relevance Objections

6 FedEx moves to strike paragraphs 5-7 as immaterial because
7 they provide only biographical information. The motion is denied.
8 FedEx moves to strike paragraphs 10-13, 15-16, 31, 79, 81-82, 86-
9 88, 91, 93, and 103 as immaterial because they relate to Senga's
10 performance appraisals and awards over the past six years, because
11 while Senga has alleged that his 2006 and 2007 performance
12 appraisals were retaliatory, FedEx has not moved for summary
13 judgment against that claim. The motion is denied.

14 FedEx moves to strike paragraphs 25-30, and 32-44 because they
15 relate to positions in Las Vegas, Seattle, and Phoenix that were
16 filled before Senga engaged in any protected activity, and
17 therefore do not form the basis for any claim in this lawsuit.
18 FedEx moves to strike paragraphs 62, 64, 65 and 66, which relate to
19 the Phoenix SCM position and paragraph 63, which relates to the
20 Assistant SCM position in Denver, because Senga admits he did not
21 apply for these positions. FedEx moves to strike paragraphs 74 and
22 75 because plaintiff's conversations with Larry Wollert do not
23 relate to positions that are at issue in this motion. The court has
24 not relied on these portions of Eric Senga's declaration for its
25 recommendations herein, but even considering this evidence does not
26 advance Senga's case. The motions are therefore denied as moot.

1 Conclusory

2 FedEx moves to strike as conclusory the statement in paragraph
3 24 that "In the summer of 2005, I began to perceive that my upward
4 track in the company was being hindered." The motion to strike is
5 denied.

6 Hearsay

7 FedEx moves to strike as hearsay paragraphs 17, 25, 29, 30,
8 35, 63 (second and third sentences), 64, and 77. The motion is
9 granted.

10 Improper Foundation

11 FedEx moves to strike paragraph 22 because the declaration
12 states, "On January 31, 2005, I sent an email to Bill Cherry
13 [Exhibit G, Senga 091,]" when Exhibit G actually shows an email
14 between Senga and Mike Zanolli on December 15, 2006.

15 FedEx moves to strike paragraph 27 because the cited exhibit,
16 Exhibit H, is not what Senga says it is. Senga claims it is the
17 company's written policy requiring all jobs to be posted, but the
18 document actually states only that each internal candidate must be
19 tracked.

20 FedEx moves to strike paragraph 67 because the cited exhibit,
21 Exhibit Z, is Senga's own statement submitted to the EEOC, and does
22 not support Senga's assertion that this exhibit represents
23 verification in writing from all other managers and supervisors in
24 FedEx's northern region. These motions are granted, with the
25 exception of Exhibit Z itself.

26 ///

Conclusion

I recommend that FedEx's motion for partial summary judgment (doc. # 34) be GRANTED in part and DENIED in part. I recommend that Senga's motion for judicial notice (doc. # 60) be DENIED. I recommend that FedEx's motion to strike be GRANTED in part and DENIED in part.

Scheduling Order

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due March 5, 2009. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due March 19, 2009, and the review of the Findings and Recommendation will go under advisement on that date.

Dated this 18th day of February, 2009.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge